Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	)	
	)	
Implementation of Section 255 of the	)	
Telecommunications Act of 1996	)	
	)	WT Docket No. 96-198
Access to Telecommunications Services,	)	
Telecommunications Equipment, and	)	
Customer Premises Equipment	)	
By Persons with Disabilities	)	

COMMENTS OF
SELF HELP FOR HARD OF HEARING PEOPLE, INC. (SHHH)

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1. Introduction

Self Help for Hard of Hearing People, Inc. (SHHH) hereby submits comments in response to the Federal Communications Commission s Notice of Proposed Rulemaking on Access to Telecommunications Services, Telecommunications Equipment, and Customer Premises Equipment by Persons with Disabilities.

SHHH is a national educational organization representing people who are hard of hearing. Its members are people of all ages and degrees of hearing loss. Through a National office, seven state associations and a network of 250 chapters and groups across the country, SHHH members consistently work towards increasing communication access to enable people who are hard of hearing to continue to function in mainstream society. Access to telecommunications is integral to being able to actively participate in today s world.

The Commission s NPRM on Section 255 was long awaited. Since Section 255 became effective on February 8, 1996, the Commission s staff has spent considerable time discussing accessibility issues with consumer groups, equipment manufacturers, and service providers. It built a record through the Notice of Inquiry and has had ongoing consultations with the Access Board staff, who issued accessibility guidelines for equipment in February, 1998. It was, therefore, with disappointment and dismay that we read the proposed rule when it was finally released April 20, 1998. The major concern is with the lack of proposed regulatory language and clear-cut rules. The

document asks over seventy questions and in many important areas reads more like a notice of inquiry than a NPRM.

Additionally, though the Commission acknowledges Section 255 as the most significant governmental action for people with disabilities since the passage of the Americans with Disabilities Act, and that Section 255 was about ensuring that all Americans can gain the benefits of advances in telecommunications services and equipment. It then proceeds to define readily achievable, a key standard for implementing the law, in such a way as to negate the entire law and call into question the notion of disability access as we have come to define it in the United States.

2. FCC Authority

SHHH supports the Commission s tentative ruling that it has more than ample authority to promulgate rules on how to comply with the equipment and service accessibility mandates of Section 255. Specifically, Section 4(i) of the Communications Act explicitly permits the Commission to perform any and all acts, makes such rules and regulations, and issue such orders, not inconsistent with the Act, as may be necessary in the execution of its functions as indicated in paragraph 26 of the NPRM. The statutory language of Section 255 itself, which directs the Access Board to develop guidelines in conjunction with the Commission and to periodically review and update the guidelines, also makes clear that authority.

Not only does the Commission have authority, it should issue regulations as this is

essential to achieving the type of telecommunications access for individuals with disabilities that was contemplated by Congress. If we are to change industry s mindset in the way products and services are designed, taking into consideration multiple users with diverse needs, then the Commission must provide telecommunications providers and manufacturers with clear guidelines so that they understand the extent and nature of their accessibility obligations from the outset.

SHHH and other consumer organizations are well aware that industry does not want to be regulated and view regulations as impinging on their culture and way of operating. However, historically market forces have never worked for people with disabilities and this is the one area where if progress in accessible products and services is to be made, regulations in some form are essential.

3. **Access Board Guidelines**

It is not clear from the NPRM whether or not the Commission proposes to adopt the Access Board guidelines. In fact, it appears the Commission is leaning towards not adopting the guidelines for services and instead developing its own regulations. The Commission states that it views the Board s guidelines as our starting point for the implementation of Section 255. We wonder what starting point means. The NPRM also mentions that the guidelines will be given substantial weight and that they will be taken into consideration as good faith actions when complaints are being investigated. The Commission is concerned that the Access Board guidelines, written for equipment manufacturers, may not be applicable to services, and therefore it is leaning towards

adapting them for a better fit. We disagree and strongly urge the Commission to adopt the Access Board guidelines in full for both manufacturers and service providers. We believe their adoption was the intent of Congress when it authorized the Access Board, as the primary agency, to develop guidelines for equipment manufacturers, and the Commission to enforce such guidelines. The Access Board has unique expertise in developing accessibility guidelines for this statute given its past experience with the Americans with Disabilities Act and the Architectural Barriers Act. We believe this is why Congress entrusted such responsibility to the Board and gave enforcement power to the Commission. We also believe that requiring the adoption of the guidelines for services would facilitate a coordinated approach to accessibility for both services and equipment. All interests industry, consumers, and the Commission will be best served by a rule that clearly states the requirements of both equipment and services. The Access Board guidelines provide such clarity. If the Commission adopts only part of the Access Board guidelines and proceeds to add its own language, there will be considerable confusion as to industry responsibilities.

Additionally, Congress gave responsibility for updating the guidelines to the Access Board. The Access Board cannot undertake such periodic updates effectively unless it is recognized by the Commission as the body with such responsibility. As is currently the case with the ADA Guidelines development and the Department of Justice, the Federal Communications Commission would need to be intensively involved in revision activities. Access to telecommunications is in its infancy and little is available to guide engineers of products and systems in developing solutions to access problems. Likewise, concrete

measures to indicate when access in telecommunications has been achieved are virtually nonexistent. Creative solutions will evolve as engineers routinely design with access in mind and a body of knowledge and expertise is built up. Meanwhile, the Access Board guidelines provide concrete goals and some examples of how to reach such goals without putting constraints on how companies achieve accessibility. The guidelines are flexible so as to not stifle innovation, a major concern of industry. The proposal presented by the Commission in the NPRM is unclear and does not provide adequate guidance. The Commission should adopt the Access Board guidelines in full and make them a clear mandate for everyone in the final rule.

4. Telecommunications vs. Enhanced Services

Enhanced services like automated voice response systems have become commonplace in the past five years. Congress could not have intended to eliminate important and widely used services from the scope of Section 255, as doing so would undermine the very purpose of the law. As the Commission so rightly states in the NPRM Introduction-Summary , the inability to use telecommunications equipment and services can be life-threatening in emergency situations, can severely limit educational and employment opportunities, and can otherwise interfere with full participation in business, family, social and other activities.

The Commission s historical distinction between enhanced services and adjunct-to-basic services has nothing to do with the issue of access to the world of telecommunications by people with hearing loss. Rather, that historical distinction has

been made in traditional Title II regulatory concepts such as tariffing, resale, networking, oversight of customer premises equipment (CPE), distinctions among voice, basic non-voice (BNV) and enhanced nonvoice (ENV), cross-subsidization issues, and the like. See Computer 11, Non-Accounting Safeguards Order and NATA Centrex Order decisions relied on in the NPRM in applying the historical distinction between enhanced and adjunct-to-basic services to this proceeding.

Many of the services currently classified as enhanced services do indeed bring maximum benefit to the public through their incorporation in the network. Eliminating these services from coverage under Section 255 creates barriers to completing a call for people with disabilities. Many people with hearing loss do not now have access to enhanced services. Many of our hard of hearing members have told us they hang up when faced with voice mail and automated voice response systems. Because these systems are so commonplace, there are many important calls that hard of hearing people are unable to complete. Such systems cannot be accessed by TTY relay services since there is generally insufficient time for the relay operator to type the choices and receive a response from the individual using a TTY. Hearing aid users have great difficulty understanding the message or discriminating between numbers such as 2 and 3. The automated voice response systems go too fast, are not clear and do not allow for repeats, making them inaccessible for most people with hearing loss. Further, if such menu systems require quick responses, they may not be usable by people with other disabilities. These menus should be set up to allow someone to escape early on by dialing a standard number such as 0 to talk to a person. This would appear to be an easy solution but some form of regulation is needed

for this to happen.

Given the broad objectives Congress sought to accomplish by its enactment of Section 255, we believe Congress intended it to apply to a broad range of services such as voice mail, automated voice response and electronic mail. Without appropriate regulations governing enhanced services , access goes one step forward and two steps backward as more barriers are created. As services merge, the distinctions between enhanced, basic and adjunct to basic are superficial at best. Communication via technology, in whatever form, whether phone calls over the internet or email received on a phone handset, must be governed by Section 255 if access is to be achieved in the manner it was intended.

Section 254 of the Telecommunications Act contains the Congressional mandate for universal service to ensure that all Americans have access to both basic and advanced telecommunications services. We believe enhanced services also falls within the scope of Section 255.

5. Telecommunications Equipment

We agree with the proposal that Section 255 apply to multi-purpose equipment when it serves a telecommunications function. When a manufacturer produces equipment that was intended for a non-telecommunications application but has use in connection to a telecommunications service, the obligation should be to the application, not the intent. As

long as the equipment has a telecommunications use, it is covered by Section 255.

We support the interpretation that the focus of Section 255 should be on functionality and that software is simply one method of controlling telecommunications functions. Therefore software should be subject to accessibility requirements to the extent that it provides telecommunications functions. Customer premises equipment (CPE) is increasingly dependent on software, and convergence is blurring historical lines between network functions and telecommunications appliances. However, we do not agree that software to be used with CPE that is marketed separately from the CPE should be excluded from coverage under Section 255. As long as its application is one that relates to telecommunications, then it should be covered. Software is a component of the CPE that is required in order to use the device for a telecommunications function. To complete a call, software is needed. The accessibility of the CPE depends on the software. Therefore it is not logical to exclude software which is not initially bundled with the CPE because it can and will be used with the CPE later. Such an approach appears to be anticompetitive. If adopted, the Commission would be promoting a policy that encourages consumers with disabilities to use bundled software.

1. 6. Manufacturers

We support the view that all equipment marketed in the United States, regardless of national origin, should have uniform accessibility requirements. The Access Board guidelines do not distinguish between foreign and domestic manufacturers. Given the large percentage of telecommunications equipment that is produced outside of the U.S, Section 255 would be severely limited if it were not applied universally to foreign as well as to domestic markets. Laws governing access for people with disabilities have not distinguished between domestic and foreign manufacturers. For example, televisions and telephone equipment are covered regardless of where they were manufactured. Section 255 should be applied to all manufacturers offering equipment for sale in the United States, regardless of their location or national affiliation.

We support the Commission s definition of manufacturer based on the Access Board guidelines as fixing responsibility for product accessibility on the final assembler. Equipment commonly consists of components manufactured by several different companies. Assuming assemblers have control over the components they use, they could specify accessible components from their suppliers and negotiate the cost of compliance. This approach would reduce the complexity of overseeing compliance.

7. Definition of Disability

The Commission proposes to adopt the ADA s definition of disability and the Access Board s list of categories of common disabilities. We support this proposal.

8. Accessibility and Compatibility Requirements

Usability. The Commission proposes to use the term accessibility in the broad sense to refer to the ability of consumers to actually use the equipment or service by virtue of its inherent capabilities and functions. SHHH disagrees with this approach. It is important to preserve the nuances of the two words, usability and accessibility, and maintain the way the Access Board handles the two definitions. *Usability* and *accessibility* are two different concepts. Use is independent of access and there is the potential to overlook usability when the two are merged together.

The Commission rules should cover not only the engineering of the product or service, but also the company s business practices as well. The ability to access customer service, pay a bill, and receive general product information in accessible formats is integral to using the products or services and hence must be covered.

Although the Commission proposes to adopt the Access Board s definition of usability (which requires access to the documentation for the product, including instructions, product information including accessible feature information, and technical support), it is not clear whether the Commission intends to actually impose these as requirements. Because there is no regulatory language proposed on this issue, one cannot determine if the Commission intends that these items are required, or rather options for the service provider that will be looked favorably upon after a complaint has been filed.

Accessibility. The Commission proposes to adopt the Access Board s definition of

accessibility and related appendix materials, including the requirements for access to input, control, and mechanical functions, and to output, display, and control functions. The Commission proposes to use the definition as a basis for evaluating accessibility obligations for equipment, consumer support services and telecommunications services. We support using the Access Board s guidelines to evaluate telecommunications service accessibility as well as products. However, there is no proposed regulatory language making it clear that such access is required of all telecommunications manufacturers and service providers, not merely that the Commission will look at these factors only if a complaint against a company is filed. Language to this effect needs to be clearly stated as a rule.

9. Compatibility

The Commission proposes that devices and CPE should be considered commonly used by people with disabilities when they are affordable and widely available. We vehemently oppose this definition. Many specialized devices are not very affordable (e.g., telebrailles that cost several thousand dollars). Therefore, these devices, are not very widespread. However, they are critical for deaf/blind people to have access to telecommunications. Each disability group could easily identify which devices are functionally effective and are most commonly used by individuals with a particular disability. SHHH encourages the Commission to enlist the help of the various disability organizations to compile and maintain a list of commonly used devices. SHHH would be pleased to assist in developing a list of devices commonly used by hard of hearing people for access to telecommunications.

The Commission also proposes that there be a rebuttable presumption that a device is commonly used when it is distributed in a state equipment distribution program. We support this proposal.

The Commission proposes to adopt the Access board s list of five criteria for determining compatibility. We support adoption of these criteria.

10. Readily Achievable

The Commission has markedly altered the definition of readily achievable (i.e., easily accomplishable and able to be carried out without much difficulty or expense) compared to how it has previously been interpreted in disability law. Although the Commission states that readily achievable as defined by the ADA is applicable to telecommunications equipment and services , it goes on to propose a smorgasbord of options that can be considered in the determination of readily achievable which includes feasibility, expense, practicality (resources, cost recovery, market considerations) and other considerations. Some of the proposed factors are appropriate in a telecommunications environment but others seriously undermine Section 255 and would guarantee that few, if any, accessible products, come to market.

The term readily achievable was adopted from the ADA as an enforcement standard for Section 255. However, although the term is borrowed, the determining factors proposed by the Commission are markedly different from those that have traditionally been applied

under the ADA. In response to the Commission s Notice of Inquiry questions were raised by commenters as to how applicable the concept readily achievable, as used in the built environment, is to the telecommunications arena. Several commenters noted that the definition should be adapted when applied to telecommunications. This reasoning results from viewing access as an expense and a negative feature rather than as an opportunity. There are sound business reasons for accessible design. There may in fact be value added to a product from built-in accessibility features. For example, accommodations made in the built environment such as elevator bells and lights, voice announcements, and curb cuts are found to have a high percentage of users without disabilities. There is no reason to believe that this will not be replicated in telecommunications. One obvious example is the volume control feature on telephones which everyone finds useful in noisy situations or when the other party has a very low voice. Accommodations in telecommunications provide alternative modes of operation which could be attractive to a variety of users who are not necessarily disabled.

Historically, the definition of readily achievable in the disability arena government and agency interpretation has been based on the resources of the facility. Though readily achievable is a lower standard than undue burden, the Department of Justice uses the same factors in determining both. The Commission proposes that the same factors used under the ADA--- resources including financial, staff, facilities, and other-- available to the provider to meet the expenses associated with accessibility may be taken into consideration. Following the ADA, the Commission proposes to establish a presumption that the resources reasonably available to achieve access are those of the entity legally

responsible for the equipment or service which is subject to Section 255. The resources of a parent company may be considered only to the extent those resources are available to the subsidiary. We believe this is a fair and reasonable determination.

Technical feasibility (lack of available technology or physical impossibility) is also a reasonable factor in a readily achievable determination specific to telecommunications. However, this should be an evolving concept. As new technology is developed, designing a particular access solution that is not possible today may become possible in the future and therefore could no longer be used as a rationale for not providing access. Industry should have an obligation to continually assess the accessibility of its products. We support the Commission s statement in footnote 200. Although existing accessibility solutions are, by definition, feasible, we do not propose to determine that a solutions is unfeasible simply because the solution has not yet been found .

The Commission also states that there might be legal impediments to implementing some features. In the event of proprietary and standards issues creating barriers to designing access, the Commission should create a process to reduce regulatory impediments within the Commission and require anyone asserting this defense to demonstrate their efforts to overcome legal impediments.

The two factors that significantly and dramatically undermine the Congressional intent of the statute are **market considerations** and **cost recovery.**

1. Market Considerations. These are defined as including the potential market for the more accessible product, and the extent to which the more accessible product could compete with other offerings in terms of price and features.

1.

It is difficult to understand why market considerations were included in the list of readily achievable determinations. The underlying premise for including Section 255 in the Telecommunications Act of 1996 was precisely because market forces rarely work for people with disabilities. Every improvement of significance in making telecommunications accessible has come about as a result of legislative requirements not market forces.

1.

Telecoils and volume control in voice telephones, decoding capability in TVs, and telecommunication relay services are just a few examples of legislation that has enabled people with hearing loss to use telecommunications and without which such changes would not have occurred. All came about as a consequence of federal mandates. Indeed, FCC Commissioner Harold Furchtgott-Roth, despite his general support of deregulation, conceded that, This particular area of regulation may well be a rare instance of where the involvement of the federal government introduces efficiencies unlikely to develop in the market. If, under the readily achievable test, manufacturers are exempt from making accessible products in instances in which there is a perceived or relatively small market, then we will never achieve the changes in access that Congress intended for people with disabilities under Section 255.

1. One relevant example is the introduction of talking caller ID. This provides access to caller ID for blind people. If market factors had been taken into consideration, talking caller ID would never have been developed. If industry is permitted to compare the market potential of an accessible product with that of other mainstream products, (which are often inaccessible), then the Commission is in effect sanctioning the sale of inaccessible products. **Such market comparisons have no place in the determination of readily achievable and are in direct conflict with the underlying premises for the law.**

1.

The Access Board guidelines provide that no change shall be undertaken which decreases or has the effect of decreasing the net accessibility, usability, or compatibility of telecommunications equipment or CPE . The Commission is concerned that this principle should not operate in such a way as to prevent legitimate feature trade-offs as products evolve, nor should it stand in the way of technological advances. Clearly it is not in anyone s best interest to interfere with technological development. However, it is critical that a particular access function is retained, even if it is achieved differently. No matter how a product or service is changed, the basic access function should be retained in whatever mode makes access possible. There are many such examples of disability access going backwards, resulting in people being relegated to second class status. Blind people lost access to computers when graphic user interface was first introduced. Hard of hearing people lost access to phones when digital wireless handsets were introduced. As a society, we must ensure that as technology advances, the needs of people with disabilities are addressed appropriately. Such access has been long in coming in America and we cannot afford to go backwards. We encourage innovation and development and want to be sure that designers plan for access, either through existing access functions or via other innovative solutions

Cost Recovery. This is defined by the Commission as the extent to which an equipment manufacturer or service provider is likely to recover the costs of increased accessibility. Introducing cost recovery as a factor in assessing readily achievable is wholly inappropriate and will likely result in few accessible products being developed for all of the reasons detailed above. Section 255 was adopted by Congress precisely because the

market has traditionally not worked for people with disabilities. In America we recognize that there is a greater good in ensuring that people with disabilities have access to work, medical care, travel, and everyday living. Telecommunications are central to one s ability to function as a productive citizen in America and consequently we have determined that there is a greater good to society in ensuring that such access is mandated and provided, if it is feasible to do so.

1.

Protection from incurring an excessive cost burden is already provided by the readily achievable language, which is interpreted to mean: easily accomplished and able to be carried out without much difficulty or expense . Indeed, this cheap and easy interpretation, which has traditionally been used under the ADA is now suggested for Section 255, is already a low standard. Readily achievable is considerably less burdensome than the undue burden standard implying significant difficulty or expense that is applied to public entities under the ADA.

1. There may well be some costs in providing such access that are not covered by increased sales to people with disabilities. These costs can be spread out over the thousands or millions of users to ensure that people with disabilities can fully participate in today s society. Such is the case with the Telecommunications Relay Services (TRS) for which all of us pay a small amount (i.e., 10 cents) each month on our monthly phone bill to support such services for people who are hard of hearing, deaf, or speech impaired.

1. In summary, although certain economic and cost factors are appropriate in the determination of readily achievable (i.e., overall resources of the entity, nature and cost of the action), cost recovery and market considerations have no place in the consideration of disability access. These are concepts that would not only undermine the intent of Section 255 but could also negatively impact the general approach to disability access as it has evolved in the United States in the past 10 years.

Timing. If a product is introduced without accessibility features because such access features were not possible at the time, the Commission states that Section 255 does not require that the product be modified to incorporate subsequent, readily achievable access features. We do not believe this was the intent of the law. Congress could not have intended that access be put off forever. Timing should not be a defense in itself. Section 255 applies to the design and development of a product. Access should be incorporated in the early stages of design. When such features are not possible, there is an ongoing obligation for the company to stay abreast of technological advances and incorporate the appropriate access solution when it is technically feasible to do so. Readily achievable should be a determination throughout the design and development stage, no matter how long or short that is. The Access Board guidelines require incorporation of access when there are significant upgrades of products. This requirement should be incorporated into the Commission s rules for both products and services.

Given the wide range of telecommunications products emerging constantly, the unique nature of disabilities, and the status of access solutions SHHH agrees that readily achievable determinations should be made on a case by case basis.

1. 11. Enforcement Authority

SHHH supports the Commission s view that in vesting the agency with exclusive jurisdiction to undertake enforcement of Section 255, Congress intended that the agency s full complement of enforcement powers would be available. These include Sections 207-208, 312 and 501-504 of the Communications Act.

Sections 207-208. The Conference Report makes explicit reference to the use of Sections 207-208 in the enforcement of Section 255:

> The remedies available under the Communications Act, including the provisions of Sections 207 and 208, are available to enforce compliance with the provisions of Section 255.
> Conf. Rep. 104-230, 104th Cong., 2d Sess. (1996) at 135.

The importance of this reference cannot be overstated. These sections have been on the law books since the Commission was founded in 1934 and, indeed, were taken from the Interstate Commerce Act adopted in the 1800 s as amended in 1909, 24 Stat. at 382. Paglin, A Legislative History of the Communications Act of 1934, Oxford University Press (1989) at 37. They are a basic means by which citizens have protection from federally regulated industries, and Circuit Court review of agency disposition of their complaints is a basic means by which citizens have protection from action contrary to law by federal regulators.

This venerable statutory and regulatory scheme is versatile and adaptable to needs ranging from major litigation between industry parties to the resolution of complaints filed by individuals citizens, e.g., a complaint about violation of a provision of the Act against divulging the contents of a person s private telephone conversation in Long Beach, California, Elehue and Lucilee Freemon v. AT&T, 75 RR2d 1165 (1994); refusal to accept an order for service from a teenager in Pittsburg, Kansas, Richard Johnson v. Southwestern Bell Telephone Co., 16 RR2d 941 (1969); and an overcharge to an individual in Los Angeles for a single long distance call, Charles Spencer Williams v. Pacific Telephone and Telegraph Co., 28 RR2d 1022 (1973).

Sections 207-208 are available for dealing with properly structured class actions on behalf of similarly-situated parties, e.g., Phillips v. Grand Trunk Ry., 236 U.S. 662, 665 (1915) (under the Interstate Commerce Act, holding that a proceeding to determine the reasonableness of a railroad rate was not in the nature of private litigation between a Lumber Association and the carriers, but was a matter of public concern in which the whole body of shippers was interested.); Certified Collateral Corp. v. Allnet Communications Services, Inc., 63 RR2d 1185 (1987); and Associated Students of the University of Arizona v. AT&T, 28 RR2d 805 (1973) (examples of class action complaints brought under Section 208, albeit unsuccessfully on the facts of the cases).

The relief sought under Sections 207-208 may be monetary damages, which can amount to a small sum of money for an isolated individual case or more substantial sums in

industry-complaint cases. The relief may also be to enjoin a party from engaging in unlawful conduct, e.g., United States v. Southwestern Cable Co., 392 U.S. 157 (1968) (FCC has power to grant injunctive relief under its plenary agency powers in the Communications Act); Mocatta Metals Corp. v. ITT World Communications, Inc., 28 RR2d 237 (injunction may lie under Sections 207-208 if monetary damages do not adequately compensate an aggrieved party).

Sections 312 and 501-504. The Conference Report states, without any reservation, exception or limitation, that the remedies available under the Communications Act are available to enforce compliance with Section 255. Section 312, in one form or another, has been on the law books since formation of the Federal Radio Commission in 1927 and continuing upon formation of the FCC in 1934. Sections 501-502 date back for a similar period of time; Sections 503-504 date back to an amendment of the Act adopted in 1960, following which a vigorous monetary forfeiture program has ensued.

Subsection (a) of 312 provides for revocation of FCC authorizations for willful or repeated violation or failure to observe any provision of the Act or FCC regulations implementing the Act. Some members of the service provider and manufacturer communities to which Section 255 applies, do hold such FCC authorizations.

Subsection (b) of 312 provides for issuance of cease and desist orders addressed to anyone who has violated or failed to observe any provision of the Act or implementing regulations. In the appropriate case, this subsection can reach any service provider or

manufacturer to which Section 255 applies.

Subsection (b) of 503 provides for monetary forfeitures assessed against any person who willfully or repeatedly fails to comply with any provisions of the Act. Section 504 vests collection responsibilities, which involve federal district court review of the Commission s determination, in the Department of Justice. In the appropriate case, these forfeiture provisions can also reach any service provider or manufacturer to which Section 255 applies.

12. Complaint Process

Filing Fees. As an organization representing consumers, SHHH supports the Commission s proposal not to require filing fees for complaints directed at equipment manufacturers and service providers that are not common carriers. We understand that the Commission is required to impose a filing fee for formal complaints directed at common carriers under the Communications Act, but may waive the fee if doing so would be in the public interest. Consumers should not be charged a fee for efforts to gain access to telecommunications products and services. This is a different situation from that of companies filing complaints against each other for business purposes. Therefore, it is in the public interest to waive the filing fee.

Standing Requirement. The Commission has proposed that there be no standing requirement. This deviates from other accessibility laws, which allow only individuals with disabilities, or organizations representing them, to have standing. Leaving standing

open can encourage complaints by companies against other companies. Section 255 is intended to protect individuals with disabilities against discrimination in telecommunications. It was not intended to be used by companies to file complaints against each other. There should be a standing requirement for filing complaints.

No Time Limit. SHHH supports the Commission s proposal not to establish any time limit for filing complaints. A consumer may not know whether a product or service is fully accessible until they purchase it and start to use it. This may be any length of time after the product or service is introduced. Therefore, it is important that no time limit be set for when a complaint can be filed.

1. Complaints Against Manufacturers. Congress intended that Sections 207 and 208 apply to enforcement of Section 255 without distinction between service providers and manufacturers who might come within the definition of common carriers and those who might not. Subsection (b) expresses the obligations of manufacturers; subsection (c) expresses the obligations of service providers; subsection (e) grants the Commission exclusive jurisdiction to deal with all complaints regarding compliance with these obligations, without regard to whether the complaints are addressed to manufacturers or service providers or both; and the Conference Report interpreting subsection (e), likewise without differentiating between manufacturers or service providers or both, states that Sections 207-208 are available for dealing with Section 255 complaints.

1.

This clear legislative intent is reinforced by the reality that, in the rapidly changing present and future telecommunications worlds, to which the Telecommunications Act of 1996 is addressed, the boundary lines between classic common carriers and others have become blurred and most likely will increasingly become more blurred in the future. S. Rep. 104-23, 104th Cong., 1st Sess. (1995) at 2-10, 37-39; H. Rep. 104-204, 104th Cong., 1st Sess. (1995) at 48-55, 97-112; statement of Senator Leahy in the floor debate of the Telecommunications Act of 1996: I think Congress has been behind the curve in telecommunications. We need to update our laws to take account of the blurring of the formerly distinct separation of cable, telephone, computer and broadcast services . Cong. Rec. S8067 (daily ed. June 9, 1995). For the most recent, stunning example, see the attached article AT&T Buys TCI, Looks to One-Stop Future , in *The Washington Post*, June 25, 1998.

Regulations Governing Complaints. The current grid of regulations regarding complaints under Sections 207-208, updated in 1988, is generally suitable for enforcement of Section 255. The modified grid of regulations, announced in 1997 and currently the subject of reconsideration and court appeals, with strengthening of discovery provisions, also is generally suitable for enforcement of Section 255. The Commission s generic rules for handling informal complaints, not otherwise covered by the regulations addressed to specific regulatory programs, obviously will not suffice if that is intended as a permanent means of dealing with complaints under Section 255. The Commission can point to no other regulatory program that it administers in which these catchall informal complaint rules are the sole remedy for aggrieved parties.

Need for Respondents to Produce Relevant Documents and Information. Citizens who file complaints often must rely on circumstantial evidence concerning the actions of respondent parties relative to compliance with legal obligations. The vast majority of the relevant evidence, if not all of it, will likely be in the private possession of the respondent service provider or manufacturer or both. The modified grid of regulations announced in 1997 recognizes this and allows complainants to rely on circumstances for which they do not have first-hand information, so long as the basis for their complaints is set forth fully. However, under those regulations, the responding parties need only provide information and documents on which they rely for their position, which allows them to pick and choose the evidence that best serves their interests. The better and fairer course is to require the respondents to provide documents and information that are relevant to the

complaint rather than only those documents and information on which they choose to rely. Indeed, the courts have held that in litigation situations, where relevant documents within the private possession of a party are withheld, the presumption may be made that those documents, if produced, would be adverse to that party s interests. Interstate Circuit, Inc. v. United States, 306. U.S. 208 (1938).

Five Month Limit. We believe Congress intended that the five-month deadline for agency action (on complaints under Section 208) applies to complaints relative to Section 255. That deadline applies to investigations of practices of parties governed by the section. While the previous 12-month deadline under subpart (b) of Section 208 may have been intended to apply only to tariff matters when enacted in 1988, since that time much of the nation s telecommunications activity has been de-tariffed. Moreover, in the Telecommunications Act of 1996, Congress established an open competition landscape in which additional, vast de-tariffing has taken and is taking place. Further, in the Telecommunications Act of 1996, Congress cut the 12-month deadline to five months along with a very large number of other statutory time lines based on the perception by Congress that the Commission has been taking too long to transact its business. Under these circumstances, if Congress intended the five-month deadline to apply only to the narrow category of relatively few tariffed practices that remain in today s telecommunications world, it surely would have said so. In identifying Section 208 as an enforcement mechanism for Section 255 complaints, Congress would have identified only subsection (a) of 208. Instead, Congress identified the entire Section 208 including subsection (b) containing the five-month deadline for action on complaints regarding

practices of a respondent party.

The passage of time before action is taken on a Section 255 complaint can be specially harmful. Complaints for a traditional Title 11 matter such as the reasonableness of rates charged for telecommunications services often are remedied by an ultimate monetary award including interest accruing during the time period of the delay. Complaints under Section 255, if unduly delayed, can cause incalculable harm to consumers with hearing loss that will never be compensated by an ultimate monetary award. Already, more than two years have passed since enactment of Section 255. This has been, and will continue to be a time of explosive growth in the development, manufacture, marketing and provision of telecommunications equipment and services. During the time period when a Section 255 complaint lies pending and unacted upon before the agency, that explosive activity will continue. The complaint may ultimately be determined to have merit, yet the non-conforming equipment/services complained of proliferate and have become imbedded in the telecommunications system, causing harm from a violation of the statute that cannot be undone. Non-conforming equipment/ services are in the system and may remain there for years to come. Experience has shown that attempts at education of consumers with disabilities about a nonconforming product or service to be avoided is no substitute for preventing the nonconforming activity in the first place.[1]

While injunctive relief is available under Section 208, the basis for that is often difficult to

[1] For example, currently many wireless phones do not include telecoil compatibility as built-in options. Educational efforts by SHHH and other organizations cannot eradicate the continuing purchase of these

establish in advance of the adjudication of a complaint on its merits. Moreover, to enjoin equipment/service pending ruling on a complaint, which ultimately is held to be without merit, is no more fair to the manufacturer/service community than the unfairness to consumers with hearing loss of allowing equipment/service to go forward when the complaint ultimately is upheld. The answer is for the Commission to be prepared to act promptly within the statutory deadline.

Formal Complaints. Formal complaints should not be conditioned on Commission approval. While it is hoped that most concerns will be addressed in the fast-track procedure or in resolving informal complaints, parties who have standing in the matter must have the right to go forward with a formal complaint procedure if the matter warrants it and they have the means to do so. Otherwise, the Commission would have a veto power over the exercise of a procedure that historically has provided discovery and other rights essential for the protection of citizens in dealing with regulated industries.

If Congress wanted to so circumscribe the ability of people with disabilities to seek enforcement of Section 255 by the Commission, it surely would have said so. To the contrary, the Congress made clear that the venerable complaint and remedy procedures under Section 207 and 208 would be available.

Fast Track Problem-Solving Phase. The Commission states that the fast-track process is the heart of their proposal. We like the fact that the Commission is proposing

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phones by hearing aid users and the ignorance of the issue itself by audiologists who counsel such users.

to assist consumers with informal complaints and facilitate resolution of problems as quickly as possible. How fast this realistically can be accomplished is the issue. Even assuming that the company has already set up internal processes for monitoring access, it may well not be possible for a company to assemble the documentation in five days. Having said that, we also do not want to drag out the process if the complaint can be easily resolved and there is a solution that would enable the consumer to get access quickly. Therefore, we recommend giving companies ten working days to respond on the fast track. We also believe there should be an outside limit on the length of this fast-track period; we recommend that it not extend beyond a maximum of 30 days. Extensions beyond the initial ten days may be requested but the process should be brought to a close or moved into the informal or formal complaint process at 30 days.

There may be situations in which a complaint has been registered against a particular company before and a pattern and practice is emerging of the company making no serious efforts towards accessible products and services. In such instances, consumers should be advised to skip the fast track and go to the informal or formal complaint process directly.

The complainant should be notified that a complaint has been referred to a company in the fast track, and they should also be given information about the time expected for a response and any other action the Commission intends to take. In the event that the complaint is not resolved, the consumer should have the right to proceed to dispute resolution at 30 days or before.

The Commission proposes establishing a central Commission contact point for all Section 255 inquiries and complaints. In order to ensure that consumers are aware of the opportunity to address inquiries and complaints to this central contact point, the Commission will need to advertise and disseminate widely the 800 number to call. In order for the Commission to be responsive to consumers inquiries, the call center staff handling complaints should have expertise not only in Section 255 but also disability access issues, including other disability laws. They also need to be trained in communicating with consumers in a variety of formats including TTY, relay, and Braille. Such staff should also be trained in communication techniques to facilitate the contact with individuals with a variety of disabilities. The Commission should initiate a campaign to educate consumers about Section 255. Technical assistance materials should be developed and disseminated widely. The information should include the 800 number to contact the Commission; the requirements under Section 255 for telecommunications service providers and manufacturers; procedures for filing complaints; contact information for manufacturers and service providers among other things.

13. Defenses to Complaints

Product vs. Product Line. We agree with the Commission s interpretation that Section 255 requires manufacturers and service providers to consider providing accessibility features in each product they develop and offer. Section 255 is designed to change the way products and services are manufactured and delivered. It is intended to be the impetus to have accessibility on the radar screen when engineers are designing new products and services. The ultimate goal is to have products and services universally

designed for multiple users and away from the need for accessories and assistive technology. When a company has truly attempted to make each product and service as accessible as possible during product development and has demonstrated those good faith efforts, we agree with the Commission that this is the starting point of a readily achievable defense. In the event that this has been found to be not readily achievable, only then do we believe it is reasonable to do a product line analysis. Product line should not be the trigger for decisions on providing access features at the outset. Rather, product line should be the second tier approach when product by product has failed. At that point, industry may take into account the accessibility features of other functionally similar products that are already offered or may be offered, so long as such a product line analysis increases the overall accessibility of the provider s offerings.

There is also the pricing issue. A product line offering should not be at the low end or the high end of a product line. The consumer should not be forced to buy the cheapest and most feature-slim option, nor the most expensive and feature-rich product in order to have an accessible product or service they can use.

14. Penalties for Non-Compliance

The Commission proposes, given the importance of the accessibility mandate, to employ the full range of penalties available under the Communications Act in enforcing Section 255. The development of the law of monetary damage to a complaining party caused by a violation of Section 255 by a respondent party must be developed on a case by case basis. It is anticipated that most remedies for such violations will be injunctive relief and cease

and desist orders. Given the Commission s effective use of monetary forfeitures in broadcast and other areas under Section 503 of the Communications Act, with collection responsibility in the Justice Department under Section 504, an aggressive forfeiture program may also be useful in the administration of Section 255.

The Commission seeks comment on whether it has a basis to order the retrofit of accessibility features into products that had been developed without such features, where their inclusion would have been readily achievable. Retrofit should be pursued as a remedy. Retrofitting is not a winning situation for either industry or consumers. It is hoped that companies which are forced to retrofit will recognize the importance and benefits of considering access at the outset of their design and development.

15. Conclusion

The need for regulations to implement the requirements of Section 255 are critical. SHHH appreciates the opportunity to submit comments in this very important proceeding.

Respectfully submitted,

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